

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
vs. )  
)  
GREGORY HOFFMAN, )  
)  
Defendant. )  
\_\_\_\_\_ )

Case No.: 2:08-CR-027-GMN-GWF

**ORDER**

Before the Court is Petitioner’s Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 (ECF No. 127), the Government’s Response (ECF No. 129) and the Petitioner’s Reply (ECF No. 132).

Petitioner claims relief is warranted because his trial counsel was ineffective on several grounds. The first three grounds are closely related. Petitioner claims his trial counsel was ineffective for 1) failing to address the sentencing discretion authorized by *Kimbrough v. United States*, 552 U.S. 85 (2007); 2) failing to argue during sentencing that the court was required to consider whether to exercise this discretion; and 3) failing to file a sentencing memorandum regarding the same. The fourth ground claims Petitioner’s trial counsel was ineffective for failing to send his written apology letter to the court.

**A. BACKGROUND**

Petitioner, Gregory Hoffman, was sentenced by the Honorable Robert “Clive” Jones on April 30, 2010 to a term of 240 months of imprisonment for Transportation of Child Pornography<sup>1</sup> and a consecutive term of 60 months imprisonment for Stalking<sup>2</sup> with a Lifetime term of supervised release. (ECF No. 64).

The factual basis for Mr. Hoffman’s plea of guilty is derived from the written Plea

<sup>1</sup> In violation of 18 U.S.C. § 2252A(a)(1).

<sup>2</sup> In violation of 18 U.S.C. § 2261A(2)(A).

1 Agreement. (ECF No. 43) Hoffman admitted that he possessed two compact discs with over a  
2 thousand images from a known child pornography series. *Id.* at 13. He further admitted that he  
3 repeatedly sent emails to a victim of a known child pornography series, as well as one of the  
4 victim's friends. *Id.* at 10-13. Hoffman further admitted that "[t]he course of conduct defendant  
5 engaged in with his repeated e-mails to [the victim] and to her friend, caused substantial  
6 emotional distress to [the victim]. Additionally, defendant's act in sending an e-mail  
7 containing child pornography depicting [the victim] to her minor friend caused substantial  
8 emotional distress to [the victim]." *Id.* at 13.

9 The Plea Agreement signed by the Petitioner provided the sentencing guideline offense  
10 level calculation agreed to by the parties<sup>3</sup> and then explicitly stated that, "the defendant may not  
11 seek a downward departure pursuant to U.S.S.G. 5K 1.1 or a downward adjustment pursuant to  
12 18 U.S.C. 3553 from any sentence that may be imposed within the applicable sentencing range,  
13 as determined by the Court. (ECF No. 43 at p.4, ll. 2-4). Furthermore, the parties agreed to  
14 jointly recommend a sentence at the low-end of the guideline range to run consecutively to each  
15 other.

16 At that sentencing hearing, in accordance with the plea agreement, Hoffman's counsel  
17 did not recommend a sentence below the low-end of the guideline range. Judge Jones imposed  
18 the statutory maximum and articulated his justification at sentencing as follows:

19 I am required to protect the public; and because I do think that you really  
20 do have a serious problem, just like other problems. I'm not condemning  
21 you any more than I might condemn a defendant in another type of a crime,  
22 someone who's addicted to drugs or addicted to sex or addicted to eating  
23 too much. All of us share to some extent or another in those various  
24 addictions so I'm not pointing at you a finger that makes you different or  
25 the object of hate or spite by any of us because we are all guilty of those  
various addictive type behaviors. But I do believe, and I honestly conclude  
and find that you are firmly implanted in that addiction. That is your

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<sup>3</sup> The defendant was authorized to argue whether the child pornography material portrays sadistic or masochistic conduct or other depictions of violence and whether the offense involved more than 600 images.

1 predilection. That is your tendency, your desire; and a short sentence or  
2 anything shorter than the statutory maximum, just simply would not be  
sufficient to protect the public.

3 Number one factor in my mind is protecting the public because of your own  
4 particular circumstances. I don't think I can afford to have what otherwise  
5 would be a merciful stance because I just don't think I'm capable of  
6 protecting the public other than by setting the maximum sentence. I'm  
7 required to look at your own particular circumstances and I appreciate that.  
8 You don't have a criminal record of drug violations or shooting people or  
9 holding up banks, but you do have the background and circumstance and  
learned behavior that you have and that's what we deal with; and statutory  
maximum is all really that would satisfy addressing the minimum sentence  
necessary to help you with that problem.

10 (ECF No. 127-2, Ex A Part 2 - Transcript of Sentencing Hearing, at 33-34.)

11 **B. INEFFECTIVE ASSISTANCE OF COUNSEL**

12 All three of Petitioner's claims assert a form of ineffective assistance of counsel. To  
13 prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient  
14 performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Supreme  
15 Court recently explained:

16 "To establish deficient performance, a person challenging a conviction  
17 must show that counsel's representation fell below an objective standard of  
18 reasonableness. A court considering a claim of ineffective assistance must  
19 apply a strong presumption that counsel's representation was within the  
20 wide range of reasonable professional assistance. The challenger's burden  
is to show that counsel made errors so serious that counsel was not  
functioning as the counsel guaranteed the defendant by the Sixth  
Amendment."

21 *Harrington v. Richter*, \_\_ U.S. \_\_, 131 S.Ct. 770, 787 (2011) (citations and quotations omitted).  
22 The Court further explained that "surmounting [this] high bar is never an easy task." *Id.* at 788  
23 (quoting *Padilla v. Kentucky*, 599 U.S. \_\_, 130 S.Ct. 1473, 1485 (2010)).

24 The Ninth Circuit has likewise stated that in reviewing ineffective assistance rulings, it

25 "must apply a strong presumption that counsel's representation was within  
the wide range of reasonable professional assistance. We take every effort

1 to eliminate the distorting effects of hindsight, give the attorneys the benefit  
2 of the doubt, and entertain the range of possible reasons counsel may have  
3 had for proceeding as they did. Thus, even under de novo review, the  
4 standard we apply is a most deferential one. The question is whether  
5 counsel's representation amounted to incompetence under prevailing  
6 professional norms, not whether it deviated from best practices or most  
7 common custom."

8 *Stokley v. Ryan*, 659 F.3d 802, 811-12 (9th Cir. 2011) (internal citations omitted).

9 To demonstrate prejudice, a defendant must show "there is a reasonable probability that,  
10 but for counsel's unprofessional errors, the result of the proceeding would have been different."  
11 *Strickland*, 466 U.S. at 687.

### 12 **1. Failure to Address Court's Discretion at Sentencing**

13 Petitioner first claims his trial counsel was ineffective for failing to address the court's  
14 sentencing discretion as recently authorized by *Kimbrough* and *Spears v. United States*, 555  
15 U.S. 261 (2009) as it related to Petitioner's child pornography conviction. Petitioner argues  
16 that the sentencing guidelines applied to child pornography were Congressionally-mandated  
17 and not the result of any empirical study. He notes that the Sentencing Commission has stated  
18 that it is currently "undertaking a thorough examination of these offenses and the offenders  
19 who commit them, including the technological and psychological issues associated with child  
20 pornography offenses." See *U.S. Sentencing Comm'n*, February 15, 2012 Public Hearing  
21 Transcript. Citing to *Strickland v. Washington*, Petitioner asserts that it is probable that he  
22 would have received a lesser sentence had this argument been raised. 466 U.S. 668, 687-88  
23 (1984).

24 However, as the Government points out, Petitioner's argument ignores the language of  
25 the plea agreement wherein he expressly agreed to not seek a downward departure and to  
instead jointly recommend a sentence in the low-end of the guideline range. (ECF No. 43). If  
defense counsel had argued for a departure as Petitioner now claims he should have, then

1 defense counsel would have breached the plea agreement. As the Government explains in its  
2 Response, if the plea agreement was breached, “the Government could have withdrawn from  
3 the plea agreement and tried Hoffman on all five counts, exposing him to a much longer  
4 sentence.” (ECF No. 129 at 7, ll. 20-121).

5 Nevertheless, Petitioner argues in his Reply that,

6 “a discussion of the Court’s discretion to vary from the guideline range  
7 and/or that section 2G2.2 was not revised pursuant to an empirical study by  
8 the Sentencing Commission is not a breach of the Plea Memorandum’s  
9 provision precluding argument regarding section 3553 factors and/or a  
sentence below a guideline range.”

10 (ECF No. 132 at 2, ll.23-27). Petitioner explains that “the range of reasonably competent  
11 assistance required trial counsel merely to shed light upon this Court’s ability to vary” from the  
12 calculation provided by guideline section 2G2.2. (*Id.* at 5, ll. 14-16). Essentially, Petitioner is  
13 claiming that “shedding light upon the court’s ability” or reminding the court of its ability to  
14 vary from the guidelines, without specifically requesting that the court do so, does not breach  
15 the plea agreement. While it is doubtful that the same logic would be appropriate if the reverse  
16 occurred and the Government were the one to remind the Court of its discretion to impose a  
17 higher sentence stopping just short of actually requesting a higher sentence. Fortunately, the  
18 issue need not be resolved in this petition because Petitioner has failed to demonstrate that the  
19 court was not aware of its discretion or that defense counsel was required or obligated<sup>4</sup> to  
20 advise the court of its advisory power.

21 Petitioner cites to *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011) which held  
22 that a court may vary from the child pornography guidelines for policy reasons. This case did  
23 not, however, hold that defense counsel would be ineffective if it failed to advise the court of  
24 such. Rather, the *Henderson* opinion itself already served that purpose and shed light upon the

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25 <sup>4</sup> Petitioner consistently argues that “trial counsel was obliged to inform the court that it was within the court’s discretion to disregard the child pornography Sentencing Guidelines.” (ECR No. 132 at 7, ll. 1-2.)

1 court's ability. Petitioner has failed to cite any other legal authority supporting its claim.  
2 Therefore, Petitioner fails to present a claim for relief.

3 Furthermore, the probability that Judge Jones would have rendered a shorter sentence is  
4 belied by the Court's own remarks at sentencing, "...anything shorter than the statutory  
5 maximum, just simply would not be sufficient to protect the public." (ECF No. 127-2, Ex. A  
6 Part 2 - Transcript of Sentencing Hearing, at 33-34). There is no reason to believe that Judge  
7 Jones thought that the sentencing range was excessive or that he mistakenly believed that had  
8 no discretion to vary from the statutory maximum based upon policy disagreement or any other  
9 reason. Accordingly, Petitioner has failed to demonstrate prejudice.

## 10 **2. Failure to Argue *During Sentencing***

11 Petitioner's second claim is similar to the first but with a specific emphasis on the trial  
12 counsel's conduct at the hearing. Petitioner claims that his counsel was ineffective for failing  
13 to argue *during sentencing* that the sentencing court was required to consider the argument  
14 stated above in determining whether to actually grant a variance. Petitioner argues counsel  
15 failed to affirmatively request that the court articulate its position regarding the child  
16 pornography policy prior to the rendering of the sentence and again cites to *United States v.*  
17 *Henderson, supra*.

18 However, "[t]rial judges are presumed to know the law and to apply it in making their  
19 decisions." *United States v. Carty*, 520 F.3d 984, 992 (9th Cir.2008), quoting *Walton v.*  
20 *Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S.  
21 584, 609 (2002). Absent any contrary indication, the presumption is that the Court was aware  
22 that it had discretion under *Kimbrough* to depart below the low-end of the guideline range if it  
23 had chosen to do so, regardless of the recommendation of the parties, and simply chose not to  
24 do so. Furthermore, Judge Jones referenced the statutory maximum, not the guideline  
25 maximum. Likewise, the record reveals the opinion of the sentencing judge that the maximum

1 sentence was not more than necessary. Petitioner has failed to demonstrate a reasonable basis  
2 to believe the court was not aware of its ability to depart from the recommended guideline  
3 range and exercise its discretion. Nor has the Petitioner demonstrated the probability that a  
4 sentence less than the statutory maximum would have been imposed had the court been  
5 reminded of its discretion, especially in light of the court's remarks at sentencing with the  
6 particularly disturbing facts presented in his case.

### 7 **3. Failure to File a Sentencing Memorandum**

8 Petitioner's third claim is that his counsel was ineffective for failing to file a Sentencing  
9 Memorandum detailing the arguments discussed above and informing the sentencing court of  
10 its obligation to articulate whether it agrees with the child pornography guidelines on policy  
11 grounds. For the same reasons stated above, the Petitioner has failed to persuade this Court that  
12 filing such a sentencing memorandum 1) was permissible pursuant to the plea agreement; 2)  
13 was required by law; 3) was necessary in order to remind this particular court of its discretion;  
14 or 4) was appropriate and consequential for any other reason. Petitioner's counsel was not  
15 ineffective nor was his counsel's conduct prejudicial.

### 16 **4. Failure to Provide the Court with Petitioner's Apology Letter**

17 Petitioner claims that he was prejudiced by the failure of his counsel to send an apology  
18 letter to the court. (ECF No. 132 at 10, ll. 8-9). This apology letter was allegedly written to the  
19 victim Petitioner stalked and was written while he was incarcerated and mailed to trial  
20 counsel's office. *Id.* at 10, ll. 1-4. Furthermore, the Petitioner recalls a meeting with trial  
21 counsel wherein the letter was discussed. *Id.* Unfortunately, no copies of the letter were kept  
22 by the Petitioner nor is there any affidavit attesting to its contents. Nevertheless, Petitioner was  
23 provided an opportunity to allocate during sentencing and he did, in fact, apologize to the  
24 victims during sentencing. Petitioner has failed to provide any reason to assume that the court  
25 would have given the written letter any import. The court remarked upon Petitioner's apology

1 with apparent skepticism saying.

2 "I appreciate your statement that you're raising the white flag but to be  
3 honest with you, I take it in -- not in any kind of guilty or sorrowful sense. I  
4 take it because I really don't accept any proposition that you've realized the  
5 wrongfulness and, therefore, motivation to stop engaging in this particular  
6 conduct. Honestly, as I sit here, I don't think you have that realization."

7 ECF No. 127-2 at 32-33). The Court specifically stated that Petitioner's apology was not an  
8 important consideration in determining the appropriate sentence. The court then specifically  
9 disregarded its own opinion regarding the apology saying, "[b]ut that's neither here nor there."  
10 *Id.* Rather, the Court explained it was actually focusing primarily upon the safety of the  
11 community:

12 "Number one factor in my mind is protecting the public because of your  
13 own particular circumstances. I don't think I can afford to have what  
14 otherwise would be a merciful stance because I just don't think I'm capable  
15 of protecting the public other than by setting the maximum sentence. I'm  
16 required to look at your own particular circumstances and I appreciate  
17 that."

18 *Id.* Therefore, Petitioner fails to demonstrate how a written apology letter filed with the court  
19 rather than the oral apology expressed in the courtroom would have changed the court's  
20 opinion and affected Petitioner's sentence.

### 21 **C. CONCLUSION**

22 Petitioner's allegations, viewed against the record, do not state a claim for relief.  
23 Therefore, summary dismissal without an evidentiary hearing is warranted. *United States v.*  
24 *Burrows*, 872 F.2d 915, 917 (9th Cir 1989). Accordingly, the Petitioner's Amended Petition  
25 for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 (ECF No. 127) is **DENIED**.

**DATED** this 6th day of November, 2013.

  
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Gloria M. Navarro  
United States District Judge